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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO.

DOMINIC ALBERT DeANGELIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether, in determining the existence of a conspiracy for the purposes of admission of coconspirator statements under Federal Rule of Evidence §801(d)(2)(E), the hearsay statements themselves may be used to prove the conspiracy.

(2) What standard of proof is necessary to prove a conspiracy for the purpose of admission of coconspirator statements under Federal Rule of Evidence §801(d)(2)(E).

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The petitioner, Dominic Albert DeAngelis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 15, 1984.

OPINION BELOW

The panel decision of the Court of Appeals, affirming the convictions of the defendant, is unpublished and appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 15, 1984. This petition for certiorari was filed within sixty days of that date as provided in Rule 20.1 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

Rule 801(d)(2)(E), Federal Rules of Evidence:

> "The following definitions apply under this article:
>
> ....
>
> (d) Statements which are not hearsay. - A statement is not hearsay if -
>
> ....
>
> (2) Admission by party-opponent. - The statement is offered against a party and is...
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

A. Nature of the Case:

The petitioner, Dominic Albert DeAngelis, was convicted on September 9, 1983, in the United States District Court for the Southern District of Ohio, by a jury, of conspiracy to distribute cocaine in violation of 21

U.S.C. §846 and possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1). Also convicted in the same trial were Daniel Zavolta and Edward Chambers. A fourth co-defendant, Donald Zavolta, earlier pled guilty to one count of the indictment.

On September 20, 1983, the defendant DeAngelis was sentenced to ten years on each of the two convictions with the sentences to be served concurrently.

B. Statement of Facts:

The evidence established that in May of 1983, a paid federal informant by the name of Shahram Bahadori, contacted Donald Zavolta in an attempt to purchase a quantity of cocaine. The evidence established that there were a series of telephone conversations and

that ultimately Bahadori came to Columbus to meet with Donald Zavolta to attempt to negotiate the drug transaction. The initial meeting took place at a restaurant called Hoodins, with only Donald Zavolta and Daniel Zavolta present, in addition to the informant and a friend of the informant's.

The record was clear that the parties subsequently went to another location and there Bahadori was shown a man, gray haired and middle aged (who was not either the defendant DeAngelis or the defendant Chambers), identified as one of Donald Zavolta's sources of cocaine, and it was indicated to Bahadori that this man was from Chicago. After the meeting in Columbus, Bahadori continued his telephone solicitation of the defendant, Donald Zavolta, with regard to the purchase of

cocaine and ultimately an arrangement was made where Bahadori was to come to Columbus and purchase approximately one pound of cocaine from Donald Zavolta.

Bahadori then came to Columbus with D.E.A. agents, took rooms in a local motel and contacted Donald Zavolta. Zavolta came to the motel, there was additional discussion, and ultimately Zavolta indicated that the sale would take place at his residence. The informant, Zavolta and the D.E.A. agents then went to the residence of Donald Zavolta. The informant entered with Zavolta, certain discussions took place at that time and the cocaine was produced by Zavolta. The informant inspected it and then left the premises for the purported reason of bringing the money.

Although the informant testified that he saw Donald Zavolta go upstairs

and that he heard voices and then saw Donald Zavolta with the pound of cocaine, the agents testified that the informant advised that there were only two men present in the house (being Donald and Daniel Zavolta). F.B.I. agents and Columbus police authorities then entered the residence. In "securing" the premises, a number of D.E.A. agents and Columbus police officers went to the second floor, and there they found the defendant, DeAngelis, and the defendant, Chambers, in a bedroom. A search of DeAngelis' person at that time produced a magazine of a type that could be utilized in a pistol and three vials containing small quantities of cocaine, which the laboratory analysis revealed was of a different purity and mix than that contained in the pound which was to be sold.

The premises were secured for a number of hours and ultimately, pursuant to a search warrant issued by a Federal Magistrate, the one pound of cocaine was seized from an oven in the kitchen located on the first floor.

The evidence further established that the informant had never seen nor talked to the defendants DeAngelis or Chambers, that the information he had been given by the defendant, Donald Zavolta, was to the effect that the cocaine was coming from the source in Chicago.

The defense presented, among other witnesses, Donald Zavolta, who had previously pled guilty to the one count of possession with intent to distribute the one pound of cocaine. He unequivocably testified that the defendants, DeAngelis and Chambers, were in no way

involved in the transaction, that he had, in fact, acquired the cocaine in question from a source of his in Kentucky, that his two sources were in Kentucky and Chicago, and that, in fact, he had "slipped up" and told the informant the night before the arrest that he had the cocaine and was testing it or had used it, whereas because of his concern for possibly being ripped off, he had intended to convey the impression that the cocaine had not yet arrived.

After the presentation of the evidence and the charge by the court, the jury returned a verdict of guilty as to the defendant DeAngelis as to Counts One and Two and he was sentenced as was indicated in the "Nature of the Case".

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT BELOW DIRECTLY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

As noted above, the critical issue in this case is whether in deciding the admissibility of hearsay statements under the coconspirator exception to the hearsay rule, the court may consider the proffered hearsay statements to support the finding of a conspiracy. In this case, the district court quite properly held an in camera hearing prior to admitting the statements pursuant to United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979). See Tr. 81-126. However, during the James hearing the trial court received and considered hearsay statements made by the alleged coconspirators, Daniel and Donald Zavolta.

Receiving the hearsay evidence to support the requisite initial finding of conspiracy is contrary to the decisions of this Court. In Glasser v. United States, 315 U.S. 60 (1942), this Court held that "such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy." 315 U.S. at 74.

Likewise, in United States v. Nixon, 418 U.S. 683 (1974), this Court stated: "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in

furtherance of that conspiracy." 418 U.S. at 701 (emphasis supplied).

In a footnote to the above quote, the Chief Justice wrote that "[a]s a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." 418 U.S. at 701, fn. 14.

To permit a court to use the proffered statements to justify their own admission allows the hearsay to "lift itself by its own bootstraps to the level of competent evidence." Glasser, supra, 315 U.S. at 74-75.

In this case, exclusion of the hearsay statements leaves little independent evidence of a conspiracy involving DeAngelis. The only independent evidence consists of:

(1) the fact that there were several telephone calls from the home of Zavolta to DeAngelis' home in West Virginia, although the government has no knowledge as to the parties to or subject of the conversations;

(2) the fact that DeAngelis was present in the house at the time the transfer was to have taken place, although in an upstairs room; and

(3) the fact that DeAngelis had an ammunition clip and several vials of cocaine on his person, although the cocaine was not of the same purity and mix as the cocaine which was to be sold.

This evidence, viewed alone, does not reach the level of substantial, independent evidence of conspiracy. Furthermore, the district court has not had the opportunity to properly view the independent evidence standing alone to determine whether there was sufficient proof of the conspiracy.

THE DECISION OF THE SIXTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

As noted by Mr. Justice White in his dissenting opinion in the denial of certiorari in Arnott v. United States, ___ U.S. ___ (No. 82-2028 October 31, 1983):

> "The rule adopted by the Sixth Circuit and applied in this case conflicts with the one enunciated by every other Court of Appeals that has addressed the issue."

The rule of the Sixth Circuit applied in United States v. Arnott, 704 F.2d 322 (6th Cir.), cert. denied, ___ U.S. ___ (No. 82-2028 October 31, 1983), and also applied in this case, finds its origins in United States v. Vinson, 606 F.2d 149 (6th Cir. 1979) and United States v. Cassity, 631 F.2d 461 (6th Cir. 1980). In Vinson, the Sixth Circuit stated that "the hearsay statements themselves may be considered

by the judge in deciding the preliminary question of admissibility." 606 F.2d at 153.

The Vinson rule is in irreconcilable conflict with the following cases in other circuits: United States v. Nardi, 633 F.2d 972 (1st Cir. 1980); United States v. Alvarez-Porras, 643 F.2d 54 (2nd Cir.), cert. denied, 454 U.S. 839 (1981); Government of the Virgin Islands v. Dowling, 633 F.2d 660 (3rd Cir.), cert. denied, 449 U.S. 960 (1980); United States v. Gresko, 632 F.2d 1128 (4th Cir. 1980); United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); United States v. Regilio, 669 F.2d 1169 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Testa, 548 F.2d

847 (9th Cir. 1977); United States v. Miranda-Uriarte, 649 F.2d 1345 (9th Cir. 1981); United States v. Batimana, 623 F.2d 1366 (9th Cir. 1980); United States v. Andrews, 585 F.2d 961 (10th Cir. 1978); United States v. Monaco, 702 F.2d 860 (11th Cir. 1983).

With the overwhelming weight of authority contrary to the rule followed in this case and other cases in the Sixth Circuit, this Court should grant certiorari in order to provide a uniform rule of evidence in the Federal Courts.

A second issue involved in the admission of coconspirator statements commends itself to review by this Court. This issue involves the standard of proof of a conspiracy necessary to justify the admission of a coconspirator's hearsay statement. In

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this case, the judge found that the government had demonstrated a prima facie case that a conspiracy existed. (Tr. 125).

In United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977), the First Circuit considered this issue and noted that the prima facie standard was proper prior to the adoption of the Federal Rules of Evidence and when the jury had the ultimate determination as to the existence of the conspiracy. The First Circuit went on to note that the advent of Rule 104(a) took the last word away from the jury and made the judge the final "determiner" of the existence of a conspiracy. That court found a higher standard of proof implicit in the judge's new role. The ulimate standard adopted by the First Circuit was that the burden of proof to

support admission was the ordinary civil standard, preponderance of the evidence. 548 F.2d 20, 23.

In his treatise, Judge Weinstein notes:

> "While the courts which have shifted to a judicial determination of admissibility have recognized that a higher standard of proof is now appropriate because the jury will no longer have the final word, no circuit has adopted a 'beyond a reasonable doubt' test. Most circuits require a 'preponderance of the evidence'." 1 Weinstein's Evidence ¶104 [05], p. 104-52.

Numerous cases support Judge Weinstein's position, including United States v. Nardi, 633 F.2d 972 (1st Cir. 1980); United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969), cert. denied, 397 U.S. 1028 (1970); United States v. Alvarez-Porras, 643 F.2d 54 (2nd Cir.), cert. denied, 454 U.S. 839 (1981); United States v. Stanchich, 550 F.2d 1294 (2nd Cir. 1977); United

States v. Trowery, 542 F.2d 623 (3rd Cir. 1976), cert. denied, 429 U.S. 1104 (1977); United States v. Trotter, 529 F.2d 806 (3rd Cir. 1976); United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976); United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978); and United States v. Bell, 573 F.2d 1040 (8th Cir. 1978).

Although a majority of circuits prefer the preponderance standard as shown above, Judge Weinstein prefers yet a stricter test, stating:

> "It is the contention of this treatise that the fair and practicable method of providing protection to the defendant without violating the letter or spirit of the Rules lies in insisting on a stringent standard of proof before the court admits a coconspirator's statement in a criminal case.... We would prefer a standard as high as beyond a reasonable doubt, though a 'clear, unequivocal and convincing' standard or the equivalent would be suitable so long as the court was aware of the

> need to protect against abuse of coconspirator's declarations." 1 Weinstein's Evidence, ¶104 [05], pp. 104-43 and 104-44.

In the present case, although the Sixth Circuit paid lip service to the preponderance of the evidence rule, it approved the district judge's admission of the disputed evidence upon a prima facie showing of conspiracy. A review of the evidence shows that a conspiracy could not possibly be established by a preponderance of the evidence, especially without using the disputed evidence to "bootstrap" itself.

Without the disputed evidence, it is equally probable that DeAngelis was present for some other purpose, such as to negotiate a purchase from the Zavoltas on his own behalf, precluding proof of the conspiracy by the requisite preponderance standard.

CONCLUSION

For the reasons stated above, this Court should grant certiorari to review the convictions of Dominic DeAngelis due to the fact that both convictions were based upon the consideration of incompetent evidence.

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Petitioner,

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NOT FOR PUBLICATION

NO. 83-3666
NO. 83-3678
NO. 83-3680

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	:	ON APPEAL
Plaintiff, Appellee	)	FROM THE
	:	UNITED
v.	)	STATES
	:	DISTRICT
EDWARD ALAN CHAMBERS	)	COURT FOR
DANIEL JOSEPH ZAVOLTA	:	THE
DOMINIC ALBERT DeANGELIS	)	SOUTHERN
	:	DISTRICT
Defendants-Appellants	)	OF OHIO

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and REED, District Judge*

PER CURIAM. Edward Chambers (Chambers), Daniel Zavolta (Zavolta) and Dominic DeAngelis (DeAngelis) appealed from guilty verdicts rendered against them by a jury in the United States District

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*Hon. Scott Reed, United States District Judge for the Eastern District of Kentucky.

Court for the Southern District of Ohio, Eastern Division, on charges of conspiracy to distribute cocaine in violation of 21 U.S.C. §846 and possession of cocaine with intent to distribute in violation of 21 U.S.C. §841. Zavolta also appealed his conviction of one count of violating 21 U.S.C. §843(b), use of a communication facility to effectuate the distribution of cocaine.

In October of 1982, Drug Enforcement Administration (DEA) agents in Louisville, Kentucky, secured the cooperation of an individual named Shahram Bahadari (Bahadari) to assist in various narcotic investigations. Bahadari was compensated for his efforts by reimbursement for his expenses and payment of an undetermined amount following the arrest of drug trafficing suspects. Bahadari

testified that he never questioned the DEA agents as to the formula for compensating him, but that the amount he received was directly related to the amount of drugs involved in each case and the number of arrests that resulted from each investigation. Bahadari denied that his appearance and court testimony was a condition of any agreement he had entered into with DEA agents.

Pursuant to his arrangement with the DEA, Bahadari learned from a bartender in Lexington, Kentucky (Hubert Harris) that an individual identified as Donald Zavolta (brother of Daniel Zavolta) of Worthington, Ohio, was a cocaine distributor. Based on this information, Bahadari telephoned Donald Zavolta in early May, 1983, to arrange a cocaine purchase. Zavolta agreed to

meet Bahadari in Columbus, Ohio, to discuss the possible business transaction.

On May 8, 1983, Bahadari met with Donald and Daniel Zavolta in a Columbus restaurant. The conversation centered on cocaine and Donald Zavolta indicated that he could supply large quantities to Bahadari on a regular basis. Daniel Zavolta did not actively participate in the conversation, but Bahadari testified that Daniel repeatedly nodded affirmance of his brother's statements. No definite arrangements resulted from this initial meeting.

On May 13, 1983, Bahadari again telephoned Donald Zavolta at his Worthington residence to determine if Zavolta had obtained the cocaine. Zavolta stated that he had a pound available for sale the next day at the

price of $40,000.00. This conversation was taped by Bahadari and introduced as evidence during trial.

On May 14, 1983, Bahadari and DEA agents drove to Worthington to purchase the cocaine from Donald Zavolta. DEA agent Kelly Snyder (Snyder) posed as a companion of Bahadari who was to finance the purchase. After arriving in Columbus, the agents rented several hotel rooms and enlisted the assistance of local police in maintaining surveillance of the Donald Zavolta residence. After checking into the hotel, Bahadari telephoned Donald Zavolta for directions. Zavolta advised Bahadari that he would visit Bahadari and his associate in their hotel room to finalize the deal. Telephone company records reflected numerous calls between Donald Zavolta and appellant's Dominic

DeAngelis' residence early that same morning.

At approximately 4 p.m. that day, Donald Zavolta visited Bahadari and agent Snyder in their hotel room. After initial introductions, Bahadari and Zavolta decided to have dinner at a Pizza Hut restaurant while agent Snyder remained at the hotel with the money.

Bahadari testified that Zavolta told him the cocaine transaction would be completed at Zavolta's residence. He also advised Bahadari that there would be several people in his bedroom who would be there for the purpose of protecting his interests and that Bahadari should not be alarmed by their presence.

While Bahadari and Donald Zavolta were at the Pizza Hut, agent Snyder received a phone call from Daniel

Zavolta. After Snyder told him that his brother Donald was not in the room, Daniel Zavolta stated: "Everything is together. Have him call Danny."

At approximately the same time as the phone call was received from Daniel Zavolta, Columbus police officers observed an automobile registered to Chambers parked next to the Donald Zavolta residence.

Upon returning to the hotel, Donald Zavolta returned the call to his residence and talked with DeAngelis. A minute or so into the conversation, Donald Zavolta told Bahadari and Snyder "Okay, we will do the deal in 15 minutes." Within minutes of this telephone conversation, Columbus police officers observed Chambers leave Donald Zavolta's residence and move his vehicle to a parking lot a short

distance away. After parking the automobile, Chambers was observed returning to the Zavolta residence.

Before leaving the hotel, Donald Zavolta gave agent Snyder an empty bag and requested some cocaine as a bonus for arranging the transaction. Bahadari, Snyder and Donald Zavolta then drove to the Zavolta residence. Bahadari and Zavolta thereupon entered the apartment. Donald Zavolta went immediately to the second floor and shortly returned with a pound of cocaine in his possession. Bahadari and Zavolta tested the cocaine for its purity.

Bahadari went outside and informed the DEA agents that the cocaine was in the apartment. Agents then entered to secure the apartment. Upon entering, DEA agents found DeAngelis and Chambers

in the upstairs bedroom sitting on a bed. Don and Dan Zavolta were on the first floor of the apartment.

A search of Chambers' person disclosed an empty shoulder holster and a knife encased in a sheath strapped to the small of his back. A search of DeAngelis surfaced a vial of cocaine and a loaded ammunition clip for a handgun which was found under some clothing in the bedroom. Another loaded handgun was found under the mattress upon which Chambers was sitting when the police entered the bedroom.

After DEA agents secured a search warrant for the Donald Zavolta residence, additional firearms and ammunition were discovered in Chambers' briefcase and in the trunk of his automobile. The pound of cocaine herein issue was located in the kitchen oven,

and various pieces of cocaine processing paraphernalia, including a grinder and cutting agents, were unveiled by the search.

Donald Zavolta entered a plea of guilty to possession of cocaine with intent to distribute. At the trial of his brother, Daniel, Chambers and DeAngelis, he testified that said individuals had no involvement with the cocaine, but rather that someone from Lexington had delivered the cocaine to him by placing it into his trash can two days before the transaction.

The jury discredited Donald Zavolta's testimony and returned guilty verdicts on the charges of possession with intent to distribute against all three defendants, and in addition, found Daniel Zavolta guilty of one count of using a communication facility to aid in the distribution of cocaine.

On appeal, the three defendants advanced the following assignments of error: (1) insufficient evidence; (2) improper action by the government's informant; (3) admission of hearsay evidence; (4) improper admission of evidence seized pursuant to the arrests and search warrant; (5) abuse of discretion by the trial court in restricting voir dire; (6) prejudicial statements made by the prosecution during closing arguments; (7) refusal of the trial court to give requested jury instructions; and (8) improper limitation of cross-examination of the government's witness.

Defendants Zavolta, DeAngelis and Chambers urged that the manifest weight of the evidence failed to support their respective convictions. In testing the sufficiency of the evidence to support

a jury verdict, a reviewing court must view the evidence in the light most favorable to the government. Glasser v. United States, 315 U.S. 60 (1942); United States v. Kirk, 584 F.2d 773 (6th Cir. 1978); United States v. Van Hee, 531 F.2d 352 (6th Cir. 1976). Further, "[t]his court has long recognized that purely circumstancial evidence may be sufficient to sustain a conspiracy conviction." United States v. Green, 548 F.2d 1261, 1266 (6th Cir. 1977). See also United States v. Meyers, 646 F.2d 1142 (6th Cir. 1981); United States v. Luxenberg, 374 F.2d 241, 250 (6th Cir. 1967).

In the case at bar, the evidence against each of the conspirators consisted mainly of the testimony of informant Bahadari and undercover DEA agent Snyder. Certain courts have held

that testimony of an informant, standing alone, is sufficient as a matter of law to support a conviction. See, e.g., United States v. House, 471 F.2d 886 (1st Cir. 1973). Other courts have concluded that the credibility of such testimony must be viewed with great caution. United States v. Anthony, 565 F.2d 533 (6th Cir.) (per curiam), cert. denied, 434 U.S. 1079 (1974). Moreover, it is for the jury to determine the credibility of a government informant. United States v. Meyers, 646 F.2d 1142 (6th Cir. 1981); United States v. Cooper, 321 F.2d 456 (6th Cir. 1963). However, in the case at bar, the testimony of Bahadari and Snyder was corroborated by telephone records, taped phone conversations, and physical evidence.

In viewing all of the evidence in the light most favorable to the government, while mindful that credibility of witnesses is solely within the province of the jury, this court concludes that the evidence was sufficient to sustain the jury's determination of guilt.

Defendant Chambers and DeAngelis have alleged that payment to government informant Bahadari was contingent upon the amount of drugs seized and the number of arrests made, and therefore reversal is warranted under the mandate of Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965). Unlike Williamson the defendants here were not specially selected targets of a government investigation thus precluding a defense of entrapment. In addition, a study of post-Williamson case law on the issue

does not support, as defendants contend, that Williamson mandated a blanket rule prohibiting contingent fee arrangements with informants. To the contrary, the Fifth Circuit has explicitly proscribed the application of Williamson to instances where defendants were specifically designated by the government as targets for the informant's attention. See, e.g., United States v. Lane, 693 F.2d 385, 387 (5th Cir. 1982) (Williamson held inapplicable because there was no evidence that the informant was paid to implicate government-targeted defendant); United States v. Gardner, 516 F.2d 334, 343 (5th Cir. 1975) (same).

As in Lane and Gardner, supra, the informant in the instant case had no specific target. He became aware of

the Zavolta's drug activities through his own efforts and as a result of information supplied by a bartender in Lexington, Kentucky. DeAngelis and Chambers were not known to either Bahadari or DEA agents until the day of the arrests. In sum, defendants allegation that the contingent fee arrangement with Bahadari constituted a violation of due process rights does not fall within the narrow parameters defined by Williamson and therefore the appeal on this issue must fail.

Defendants Chambers and DeAngelis have also argued that statements made by the Zavoltas to Bahadari and other DEA agents were inadmissible hearsay and were improperly permitted into evidence by the trial court. The relevant rule of evidence is FRE 801(d)(2)(E), which classifies "a

statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" as nonhearsay.

As defendants correctly note, independent evidence of a conspiracy must be proved by a preponderance of the evidence before FRE 801(d)(2)(E) may be invoked. However, this court's limited review must determine if the trial court abused its discretion in concluding that independent evidence supported the existence of the conspiracy by a preponderance. United States v. Vinson, 606 F.2d 149, 152 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

Following a preliminary hearing on this issue, the trial court concluded that sufficient independent evidence had been adduced to support the

prerequisite necessary for the application of FRE 801(d)(2)(E). This "mini-hearing" technique was expressly approved by the Sixth Circuit in United States v. Enright, 597 F.2d 980 (6th Cir. 1978). Due to the lower court's adherence to well-established precedent, this court finds no abuse of discretion in the admission of the co-conspirators' statements.

Defendants DeAngelis and Chambers have alleged error in the trial court's admission of the weapons confiscated from the trunk of the Chambers motor vehicle. DeAngelis also has challenged the admission of a small quantity of cocaine taken from his person during the search subsequent to his arrest. The court gave a cautionary instruction to the jury advising them that the firearms and cocaine were to be

considered only for the purposes of proving intent, preparation, plan, knowledge, etc., and was not to be considered as proof of the character of the accused. The evidence was therefore properly admitted pursuant to FRE 404(b) and in accord with this circuit's holding in United States v. Marino, 658 F.2d 1120 (6th Cir. 1980). In addition, the search of DeAngelis' person which disclosed cocaine was constitutional under the guidelines established in Terry v. Ohio, 392 U.S. 1 (1967). See also, United States v. Korman, 614 F.2d 541, 556 (6th Cir.), cert. denied, 446 U.S. 952 (1980). Accordingly, evidence secured pursuant to this search was properly admitted.

DeAngelis also has urged that the lower court erred in restricting voir dire inquiry into the prior jury duty

of members of the panel. However, the record reflects that the judge aided rather than hindered this line of inquiry, precluding only redundant questions. Fed. R. Crim. P. 24(a) grants the trial judge broad discretion in conducting voir dire. In addition, a procedure whereby the voir dire examination is conducted by the trial judge to the exclusion of trial counsel has been approved by this circuit in United States v. Johnson, 584 F.2d 149 (6th Cir.), cert. denied, 440 U.S. 918 (1979). The record in this case simply does not reflect an abuse of discretion by the trial court in implementing the voir dire procedures.

Defendants Zavolta and Chambers have also charged that a comment by the prosecutor during closing argument was so prejudicial as to warrant

declaration of a mistrial below. The prosecutor's closing argument included a statement that "these men are drug dealers, and the evidence supports it." The prosecutor characterized this comment as a personal opinion, and the trial judge instructed the jury that the prosecutor's assessment of the case should not be considered as evidence.

Defendants have cited several cases which address the impropriety of interjecting personal opinion or belief into remarks to the jury regarding the facts of the case. It is interesting to note, however, that none of the cited cases were reversed upon the allegation of improper arguments. See, e.g., United States v. McCaghren, 666 F.2d 1227 (8th Cir. 1981) (jury told that the defendant were "guilty as sin"); United States v. King, 616 F2d 1034

(8th Cir. 1980) (prosecutor told jury that he had made up his mind about the case when it went to the grand jury); United States v. Cook, 432 F.2d 1093, 1106-1107 (7th Cir. 1970) (jury told that the defendant was "sub-human" with a "rancid, rotten mind" and was a "true monster"); United States v. Splain, 545 F.2d 1131 (8th Cir. 1976) (defendant's testimony characterized as "slick" and comment made to the jury that government would not have indicted him if he weren't guilty).

Sixth Circuit pronouncements appear to be in accord with the above precedent. See, e.g., Webster v. Rees, No. 82-5626, Slip op. (6th Cir. 1984) (prosecutor's repeated characterization of defendant as a liar and display of a "Saturday Night Special" handgun during closing arguments not reversible

error); U. S. v. Finanzzo, 704 F.2d 300 (6th Cir.) cert. denied, ___ U.S. ___, 103 S.Ct. 3543 (1983) (it is within trial judge's discretion to determine when prosecutor's comments are prejudicing the jury and to give proper curative instructions; prosecutor's expression of his personal feelings as to defendant's guilt did not provide grounds for reversal); United States v. Daniel, 422 F.2d 817 (6th Cir. 1970) (per curiam) (though improper, prosecutor's comments as to credibility of government witness did not constitute reversible error).

In view of the authority cited above, the prosecutor's reference to defendants in a narcotics case as "drug dealers" cannot be deemed so prejudicial as to constitute reversible error.

Zavolta and DeAngelis have also argued that the lower court erred in failing to give the jury a complete instruction on the issue of constructive possession. In comparing the instruction requested by defendants with the instructions given by the trial court, it appears that the court's instructions were more comprehensive than those requested by the defendants. When jury instructions are challenged, the issue presented to the reviewing court is whether the instructions, taken as a whole, fairly and adequately submit the issues in the case to the jury. United States v. Mattuci, 502 F.2d 883, 889 (6th Cir. 1974); Gradsky v. Sperry Rand Corp., 489 F.2d 502 (6th Cir. 1972) (per curiam). This court finds that the instructions in the instant case fairly

and adequately submitted the possession issue to the jury.

Finally, DeAngelis has cited to two instances in which the trial court allegedly restricted the examination of government informant Bahadari. Control over the scope of cross-examination is clearly within the discretion of the trial judge. FRE 611(b); Alford v. United States, 282 U.S. 687, 694 (1930); United States v. Daniels, 528 F.2d 705, 709 (6th Cir. 1976). This court finds no abuse of the discretion by the trial judge in the instant case.

In view of the foregoing, the convictions rendered by the trial court are AFFIRMED.

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No. 84-311

In the Supreme Court of the United States

OCTOBER TERM, 1984

DOMINIC ALBERT DEANGELIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in admitting co-conspirator statements into evidence at his trial.

1. Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1), and of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 2).[1] He was sentenced to concurrent

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[1]On May 19, 1983, petitioner, together with co-defendants Daniel and Donald Zavolta and Edward Chambers, was indicted for the above crimes. The Zavoltas were also charged with use of a telephone to facilitate the distribution of cocaine, in violation of 21 U.S.C. 843(b). On August 5, 1983, Donald Zavolta entered a plea of guilty to Count 2 (possession of cocaine with intent to distribute). The remaining defendants were convicted on all counts.

ten-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. 1-25).

The evidence is summarized in the opinion below (Pet. App. 2-9). In October 1982, Drug Enforcement Administration (DEA) agents in Louisville, Kentucky secured the cooperation of an individual named Shahram Bahadari to assist in various narcotic investigations. Working in this capacity, Bahadari learned from a bartender in Lexington, Kentucky that Donald Zavolta of Worthington, Ohio, was a cocaine distributor. Pet. App. 3-4. Based on this information, Bahadari telephoned Donald Zavolta in early May 1983 to arrange a cocaine purchase.

On May 8, 1983, Bahadari met with Zavolta and his brother in a Columbus, Ohio restaurant. Donald Zavolta indicated that he could supply large quantities of cocaine to Bahadari on a regular basis. Pet. App. 4. On May 13, 1983, Bahadari telephoned Donald Zavolta at his Worthington residence to determine whether Zavolta had obtained the cocaine. Zavolta stated that he had a pound of cocaine available for sale the next day at the price of $40,000.[2] The next day Bahadari and DEA agents drove to Worthington to purchase the cocaine from Donald Zavolta. DEA agent Kelly Snyder posed as a companion of Bahadari who was to finance the purchase. After arriving in Columbus, the agents rented several hotel rooms and enlisted the assistance of local police in maintaining surveillance of the Donald Zavolta residence. After checking into the hotel, Bahadari telephoned Donald Zavolta for directions. Zavolta advised Bahadari that he would visit Bahadari and his associate in their hotel room to complete the transaction. Telephone company records reflected numerous calls

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[2]This conversation was taped by Bahadari and introduced as evidence during trial. Pet. App. 5.

between Donald Zavolta and petitioner's residence early that same morning (Tr. 392). Pet. App. 4-6.

At approximately 4 p.m. that day, Donald Zavolta visited Bahadari and agent Snyder in their hotel room. After initial introductions, Bahadari and Zavolta decided to have dinner at a Pizza Hut restaurant while agent Snyder remained at the hotel with the money. Zavolta told Bahadari that the cocaine transaction would be completed at Zavolta's residence. He also advised Bahadari that there would be several people in his bedroom who would be there for the purpose of protecting his interests and that Bahadari should not be alarmed by their presence (Tr. 168-169).

While Bahadari and Donald Zavolta were at the Pizza Hut, agent Snyder received a phone call from Daniel Zavolta. After Snyder told him that his brother Donald was not in the room, Daniel Zavolta stated: "Everything is together. Have him call Danny." At approximately the same time that the phone call was received from Daniel Zavolta, Columbus police officers observed an automobile registered to co-defendant Edward Chambers parked next to the Donald Zavolta residence. Pet. App. 6-7.

Upon returning to the hotel, Donald Zavolta returned the call to his residence and talked with petitioner, who was at the Zavolta residence (Tr. 167, 601).[3] A minute or so into the conversation, Donald Zavolta told Bahadari and Snyder "Okay, we will do the deal in 15 minutes" (Tr. 168, 420, 421). Within minutes of this telephone conversation, Columbus police officers observed Chambers leave Donald Zavolta's residence and move his vehicle to a parking lot a short distance away. After parking the automobile, Chambers returned to the Zavolta residence. Pet. App. 7-8.

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[3]Testimony at trial established that petitioner was on the other end of the conversation (Tr. 601).

Bahadari, Snyder, and Donald Zavolta then drove to the Zavolta residence. Bahadari and Zavolta entered the apartment. Donald Zavolta went immediately to the second floor, where he conducted a conversation with persons then unknown (Tr. 171-173),[4] following which he returned with a pound of cocaine. Bahadari and Zavolta tested the cocaine for its purity. Bahadari went outside and informed the DEA agents that the cocaine was in the apartment. Pet. App. 8. Agents then entered to secure the apartment. Upon entering, DEA agents found petitioner and Chambers in the upstairs bedroom sitting on a bed (Tr. 371, 311). Donald and Daniel Zavolta were on the first floor of the apartment. Pet. App. 8-9.

A search of petitioner produced a vial of cocaine and a loaded ammunition clip for a handgun (Tr. 372). The weapon corresponding to the clip found in petitioner's possession was discovered under some clothes in the bedroom (Tr. 433, 435). See Pet. App. 9. A search of Chambers disclosed an empty shoulder holster and a knife, encased in a sheath, strapped to the small of his back. Another loaded handgun was found under the mattress upon which Chambers was sitting when the police entered the bedroom. Pet. App. 9.

After DEA agents secured a search warrant for the Donald Zavolta residence, additional firearms and ammunition were discovered in Chambers' briefcase and in the trunk of his automobile. A pound of cocaine was located in the kitchen oven, and various pieces of cocaine processing paraphernalia, including a grinder and cutting agents, were also discovered. Pet. App. 9-10.

b. Petitioner and co-defendant Chambers contended at trial that the statements made by the Zavolta brothers to Bahadari and the other DEA agents were hearsay and

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[4]Bahadari heard the voices, but could not identify them; nor could he discern the substance of the conversation. Tr. 173.

should not be admitted into evidence. The trial court conducted a lengthy hearing on the issue (Tr. 81-126) and concluded that sufficient evidence had been adduced to support the admissibility of the co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E).

2. Petitioner challenges (Pet. 10-20) the district court's admission of his co-conspirators' statements.[5] In particular, he argues that the evidentiary predicate for the admission of such statements in the Sixth Circuit differs from the standard used by this Court and other courts of appeals. But since the court of appeals' stated rationale for admission of the statements was consistent with the prevailing standard, and the statements would clearly have been admissible under either test, there is no need for review by this Court.

Most courts of appeals that have addressed the issue admit co-conspirator statements into evidence only where there is a showing by a preponderance of the evidence independent of such statements (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is admitted were both members of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. See *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660, 665 (3d Cir.), cert. denied, 449 U.S. 960 (1980); *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Bell*, 573 F.2d 1040,

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[5]Petitioner does not identify the particular co-conspirator statements to which he objects.

1044 (8th Cir. 1978); *United States* v. *Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980).

In some cases, the Sixth Circuit has permitted the trial court to consider the co-conspirator statements themselves when making its determination. *United States* v. *Vinson*, 606 F.2d 149, 153 (1979), cert. denied, 444 U.S. 1074, 445 U.S. 904 (1980); *United States* v. *Arnott*, 704 F.2d 322 (1983), cert. denied, No. 82-2028 (Oct. 31, 1983). Those cases created at least the appearance of a conflict among the circuits. See *ibid.* (White, J., dissenting from denial of certiorari).

The court below, however, applied the prevailing legal standard rather than the *Vinson-Arnott* standard. The court expressly held that the trial court must find "that *independent* evidence supported the existence of the conspiracy by a preponderance" (Pet. App. 17 (emphasis added)) and observed that the trial court here "concluded that sufficient *independent* evidence had been adduced to support the prerequisite necessary for the application of [Rule] 801(d)(2)(E)" (*id.* at 17-18 (emphasis added)). Cf. *United States* v. *Nixon*, 418 U.S. 683, 701 & n.14 (1974). The decision below thus reflects, at most, a conflict *within* the Sixth Circuit; it does not conflict with the rule as followed elsewhere.

Moreover, as our recitation of the evidence in this case establishes (see pages 2-4, *supra*), there was sufficient independent evidence to establish the existence of the conspiracy under any standard. The government's principal witnesses, informant Bahadari and DEA agent Snyder, each testified in detail about the co-conspirators' activities and those of the petitioner. Telephone logs showed numerous calls between petitioner and the co-conspirators on the morning of the principal transaction; Donald Zavolta's telephone conversation with petitioner established his part

in the conspiracy; petitioner's presence at the Zavolta residence, armed and with cocaine, further established his link to the conspiracy; and the conversation with Donald Zavolta immediately before he returned downstairs with the cocaine provided further corroboration. Even without considering the co-conspirators' statements implicating petitioner in the scheme, the predicate for admission of the evidence was clearly made. Thus, even if the standard employed by the court below were inappropriate, the result would perforce remain the same.[6]

3. The second issue raised by petitioner (Pet. 16-20) concerns the standard of proof necessary to justify admission of a co-conspirator's out-of-court statement. However, as petitioner acknowledges (Pet. 20), the court of appeals employed the stricter, majority, standard (preponderance of the evidence), rather than the prima facie case standard. There is, therefore, no conflict in legal standards warranting this Court's attention.[7] Petitioner's suggestion that the court below merely paid "lip service" to the preponderance of the evidence standard, while in fact employing some lesser standard (Pet. 20), amounts to no more than a disagreement with the court of appeals' application of the standard to this set of facts.

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[6]It is also significant that Donald Zavolta testified for the defense at trial (Tr. 495-593). His testimony was inconsistent with the implications of his out-of-court statements; as the court of appeals observed (Pet. App. 10), "[t]he jury discredited Donald Zavolta's testimony."

[7]That a distinguished commentator may advocate yet a higher standard (beyond a reasonable doubt) (see Pet. 19-20) does not create a conflict in the circuits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

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